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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. ~~842~~ 89

UNITED STATES OF AMERICA, *ex rel.* ELLEN KNAUFF,
Petitioner,

against

J. HOWARD MCGRATH, Attorney General and EDWARD J. SHAUGHNESSY, as District Director of the Immigration and Naturalization Service for New York District, and whosoever may have custody of the body of ELLEN KNAUFF,

Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Proceedings and Opinions Below

Petitioner applies for a Writ of Certiorari to review the decree hereinafter described of the United States Court of Appeals for the Second Circuit, which decree was made and entered on the 16th day of May, 1950 (42).

The background of the present case is outlined in the decision of this Court in *United States of America ex rel. Ellen Knauff* v. *Shaughnessy*, of January 16, 1950, reported in 338 U. S. 537, 70 S. Ct. 309. This Court by said decision held that the petitioner, the war bride of an honorably discharged soldier of our Army and herself an honorably discharged veteran of the Royal Air Force, was pursuant to

war time regulations excludable from the United States without a hearing. Said prior decision of this Court therefore established that Mrs. Knauff is deportable.

As will be shown subsequently in more detail, the Congress of the United States, following this Court's decision of January 16, 1950, took an immediate interest in the case of Mrs. Knauff. Private bills for the purpose of ordering the Attorney General to stop the deportation of Mrs. Knauff and to admit her to the United States were introduced in both Houses of Congress. Mrs. Knauff, however, while one of these bills was already pending in the Senate, was suddenly arrested on the 23rd of February 1950, taken to Ellis Island, and two days later informed that she would be deported to Germany by army transport on the 28th of February 1950. Such information engendered the present proceedings.

On Monday, February 27, 1950, the undersigned counsel for the petitioner submitted a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. Judge Edward A. Conger at once disallowed the writ. An appeal was taken immediately and a motion made the same day at 4:00 o'clock in the afternoon before the Honorable Jerome Frank, Circuit Judge, to stay deportation pending appeal. Judge Frank granted a stay overnight so that the motion could be repeated the following day before the full bench.

Despite the pendency of this motion, the respondent herein proceeded with the preparation of petitioner's deportation. She was, on the 28th day of February 1950, taken to the ship for Europe, accompanied by one of the high functionaries of the Ellis Island establishment, who kept in contact with his office concerning the court proceedings. The Court of Appeals heard the motion for a stay pending appeal from Judge Conger's order on February

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28, 1950 at 10:30 A. M. After brief argument the Court granted the stay pending appeal and directed that the appeal be argued on the 6th of March 1950. Mrs. Knauff was thereupon returned from the pier to the Ellis Island establishment for continued detention.

The United States Court of Appeals for the Second Circuit after argument took the case under advisement and rendered a decision dated March 28, 1950. A copy of this decision is annexed to these papers in the Appendix (*infra*, pp. 28 to 39). It was decided by a majority of the Court, consisting of Judges Learned Hand and Frank, Judge Swan dissenting, that the petition herein states a cause of action and that the writ of habeas corpus should issue. Thereafter, the writ of habeas corpus was issued by the District Court. The Government filed its return, petitioner a traverse and further affidavits. The case was finally argued before the Honorable John W. Clancy, District Judge, who filed an opinion dated May 3, 1950 (33-35) dismissing the writ.

An order upon Judge Clancy's decision was entered on Monday, May 8, 1950. The petitioner at once appealed from said order and, also on May 8, 1950 at 4:00 P. M., moved before Judge Chase of the Circuit Court for a stay of deportation pending her appeal herein. Judge Chase held the case over for the subsequent day for the full bench and petitioner was ordered on May 9, 1950 to argue the motion for the stay of deportation pending appeal together with the appeal before the bench consisting of the Honorable Thomas W. Swan (the dissenter from the decision of March 28, 1950), Augustus N. Hand and Harrie B. Chase, J. J. Said Court rendered a decision on May 16, 1950 deciding *per curiam*: "Order affirmed on the opinion below." The Court at the same time denied petitioner's motion for a stay of deportation pending appeal. None of the decisions below has been officially reported.

Petitioner on the same day, May 16, 1950, at 4:00 P. M. moved before the Honorable Augustus N. Hand, C. J., for a stay of deportation pending a petition for certiorari to the Supreme Court of the United States. Said motion was denied from the bench by Judge Augustus N. Hand. Thereupon the petitioner at once made an application to the Supreme Court of the United States for a stay of deportation pending certiorari and this application was granted on May 17, 1950 at 10:15 A. M. by the Honorable Robert H. Jackson, one of the Justices of this Court, provided that the papers on the petition for certiorari be filed in the Clerk's Office by May 25, 1950.

At the time said stay was granted, the petitioner was at the airport to leave within a few minutes for Germany. When the stay was made known to the Government officials, she was returned to Ellis Island where she is now being held in custody.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was made and entered on the 16th day of May 1950. The jurisdiction of this Court in invoked under Sec. 1254 (1) of Title 28 U. S. C. and Sec. 5 (b) of Rule 38 of the General Rules of this Court, as amended.

Statement of Matter Involved

The problem of this case is whether the respondents have the right and the power to execute the exclusion order against the petitioner while private legislation in favor of petitioner is pending in Congress and while one of the Houses of Congress, the House of Representatives, has unanimously passed the bill and while the other House of Congress, the Senate of the United States, is actively delib-

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erating on said bill. The petition for habeas corpus herein alleges, among other things, that the Honorable William C. Langer, Senator from North Dakota, introduced Bill S-2979 on February 2, 1950, which was read in the Senate and referred to the Committee on the Judiciary, and that said bill proposes that the exclusion order against the petitioner be cancelled and she be permitted to remain in the United States for permanent residence (5). The said petition further alleges that it was proposed among several Congressmen to introduce a parallel bill in the House of Representatives. The petition alleges in paragraph 7 (5) that "it has been the invariable practice in the past to stop all deportation proceedings as, if, and when, Congressional action has been taken and a private or remedial bill actually introduced in either House of Congress".

The petition further alleges that it was proposed to deport Mrs. Knauff by army transport General Maurice Rose on February 28, 1950. The petition also alleges that Mr. Mackay, Deputy Commissioner of Immigration, confirmed to petitioner's counsel on February 20, 1950, in a conference at Mr. Mackay's office at Washington, D. C., that it was the practice of the Immigration and Naturalization Service not to effectuate deportation while private relief bills concerning an alien were pending in Congress, and that this custom would be complied with in the present case. Upon these papers, Judge Conger then decided that no facts had been stated in the petition to warrant the issuance of the writ of habeas corpus. As mentioned before, upon appeal to the Court of Appeals for the Second Circuit, the majority of the judges decided that said petition did state a cause of action and that a writ should issue. Particular reference is made to the following language of Judge Frank's decision on March 28, 1950 (*infra*, p. 31):

> "Respondents, also, on oral argument of this appeal, conceded that, on the pleadings as they now stand, we must take it as true that, as alleged in the

petition, 'it has been the invariable practice to stop *all* deportation proceedings' whenever a bill, such as Senator Langer's, has been introduced in either House of Congress. We underscore the word 'all': It allows of no exceptions of cases, like this, in which an alien has been ordered to be excluded because the Attorney General, on confidential information, found that the alien's entry would be prejudicial to the interests of the United States."

"* * * the refusal to suspend action here, on the record facts, was improper. In *U. S. ex rel. Pirinsky* v. *Shaughnessy*, 177 F. (2d) 709 (C. A. 2), an alien, a resident of this country, was arrested and taken in custody in deportation proceedings. On his application for release on bail, pending decision, the Attorney General, purporting to exercise the discretion granted him by 8 U. S. C. A. Sec. 156, fixed bail at $25,000. The alien sought habeas corpus. We held that bail in excess of $5,000 was unreasonable, saying: 'It was brought out at the argument before us that the bail ultimately set was uniquely high in this type of proceeding', adding that 'there is nothing in the record to justify the singling out of the individual for unusual treatment.'

"That ruling is applicable here. It accords with many cases deciding that arbitrary use of administrative authority is invalid. It is worth recalling that that doctrine, now a vital part of American liberties, received its clearest enunciation in the famous case of the Chinese laundryman. To be sure, he was a resident alien; and it may be—although we need not and do not here so decide—that Congress could constitutionally empower an official to use his sheer personal whim or caprice in dealing with aliens (like relator) stopped at the border. But, absent an explicit congressional grant of such arbitrary power, we think it cannot be implied.

"In such circumstances as this, habeas corpus may be employed not to procure relator's release but to prevent the improper course respondents intended to pursue. For the habeas corpus statute provides that the court shall 'hear and determine the facts, and dispose of the matter as law and justice may require.' See *United States ex rel. Zaffarano* v. *Corsi*, 63 F. (2d) 757, 758 (C. A. 2).

"It is true that the Attorney General has already exercised his discretion (without a hearing) to exclude relator; that, in doing so, he decided that her admission would be prejudicial to the interests of the United States; and that this court and the Supreme Court sustained his decision.

"But that decision dealt with the issue of her exclusion. We do not hold she is not to be excluded, i.e., we do not hold that she is to be admitted. We merely hold that, so long as Senator Langer's bill is pending during the present session of Congress, the exclusion order may not be executed. Meanwhile she will be detained in custody at Ellis Island, as closely guarded as the Attorney General deems reasonably necessary to safeguard the country's interests; therefore she cannot become a security risk.

"Our decision, however, rests on the present state of the record. On the remand of this case, respondents should be permitted, if they so desire, to file a return denying the relator's allegations as to the administrative practice. If they do so, of course there will be a trial of the resulting issue of fact.

REVERSED AND REMANDED."

Subsequent to the remand of the case of the District Court and the issuance of the writ of habeas corpus, the

Government in its return denied that it has been the invariable practice of the Immigration and Naturalization Service to stay the deportation of aliens in whose behalf private bills were pending. In paragraph 9 of the Government return (15) a list of names of aliens is set forth in whose cases it is claimed that deportation took place while relief bills were pending. On the basis of these deportations, all of which were effectuated in July, 1948, it is claimed in the return that the basic allegation of the petition, to wit, that it has been the invariable practice of the Service to stay deportation pending Congressional action, was not true in fact.

This allegation of the Government has been specifically contradicted in petitioner's traverse. Said traverse also alleges new facts some of which have happened since the intended deportation of the petitioner on Febraary 28th and while the case was pending on appeal before the Court of Appeals. It stands to reason that the District Court upon the remand of this case had to weigh not only the issues raised in the original petition, but also such new issues of fact and law which were advanced, after the writ had issued, in the traverse and further affidavits. It may be pointed out at this time that the courts below, as Judge Clancy's decision shows, have considered the case only on the issue of whether or not it is the invariable practice of the Immigration Service to stay deportation pending the consideration of a private bill in Congress. One of the principal objections to the decision below is that the court also should have taken cognizance of the additional facts alleged in the traverse and subsequent affidavits. These additional facts are:

(1) The Honorable Francis E. Walter, Representative from Pennsylvania in March 1950 introduced H.R. 7614 in the House of Representatives. Hearings had been held before the Subcommittee on Immigration and the Com-

mittee on the Judiciary had, unanimously, reported the bill favorably to the full House where it was scheduled to be voted on and expected to be passed on May 2, 1950, the objection of the Government to the bill notwithstanding.

(2) The Courts below should further have taken judicial notice of the fact, which was publicized in all the newspapers of the United States on May 2, 1950, that the House of Representatives on that day unanimously passed Representative Walter's bill and that it was at once referred to the Senate for consideration.

(3) While the case was pending in the District Court before Judge Clancy, it was further alleged in the affidavit of Alfred Feingold of April 24, 1950 that Attorney General Tom C. Clark in 1948 addressed letters to Senator Wiley, who was then Chairman of the Senate Committee on the Judiciary, and to the then Chairman of the House Committee on the Judiciary, in which letters he explained that it was the standing practice of the Department of Justice not to deport persons in whose behalf private bills were pending and that the Department of Justice committed to this policy.

It is respectfully submitted that these allegations raise material issues. The court below should have weighed whether the fact that the Knauff bill had been passed in the House of Representatives did not make it mandatory for the Government to hold Mrs. Knauff in the country until the Senate had a chance to act on the bill and whether it was not an abuse of discretion despite the immediate prospect of action in the Senate to rush Mrs. Knauff out of the country.

It is furthermore submitted that the alleged correspondence between Attorney General Tom C. Clark and the Chairman of the Committees or the Judiciary was material, for this correspondence was alleged to contain in precise lan-

guage the statements of policy and commitments of the Department of Justice concerning the deportation of aliens in whose behalf private bills were pending. If this correspondence was proved, it would have been proof of the allegations in paragraph 7 of the petition for habeas corpus.

The point is respectfully made that the courts below erred in not paying any attention whatsoever to these new allegations.

While the case was pending in the United States Court of Appeals for the Second Circuit, Senate Document No. 1515, 81st Congress, Second Session, entitled, "Immigration and Naturalization Systems of the United States", was released by the Senate Committee on the Judiciary, and counsel for petitioner deposited said Senate Document No. 1515 with the Clerk of the Court of Appeals for the Second Circuit after the following passage contained in said Senate Document on page 608 had been expressly pointed out to the court below:

> "At the present time, there is an agreement between the Senate Committee on the Judiciary and the Immigration and Naturalization Service made before the adjournment of the regular session of the Eightieth Congress (2d sess.), that deportation be stayed in the case of any alien concerning whom a private immigration bill is pending in the Senate, on which bill no unfavorable action has been taken by the Senate Committee on the Judiciary by the end of the current session of the Congress. The agreement, between the House Committee on the Judiciary and the Immigration and Naturalization Service, made February 27, 1947, is that deportation proceedings not be stayed upon the introduction of a private immigration bill in the House of Representatives unless the House Committee on the Judiciary addresses some formal communication to the Service to stay proceedings."

The court below should have taken judicial notice of this publication which is hereby deposited with the Clerk of this Court so that the Supreme Court, upon the present petition for certiorari, may weigh the import of said language. It shows, in the opinion of petitioner, a clear and binding agreement between the Department of Justice and the Congress of the United States, that, pending the present private bills, the Department of Justice is under a duty to stay deportation.

It is further pointed out to this Honorable Court that in the meantime, that is to say, on May 15, 1950, the Chairman of the House Committee on the Judiciary, the Honorable Emanuel E. Celler, addressed formal communications to the Immigration Service and to the Attorney General, repeating his request for a stay of the deportation of Mrs. Knauff while the Senate of the United States is deliberating on the private bill.

This letter of Mr. Celler is pursuant to the agreement quoted, as set forth in the Senate Document No. 1515, an additional ground why the Attorney General is under a duty to desist from the deportation of Mrs. Knauff at this time.

None of these matters have been weighed, as Judge Clancy's opinion shows, by the courts below.

Judge Clancy's opinion shows that he was giving weight to the argument that the *Knauff* case is "*sui generis*", in that it is the first case involving the exclusion for security reasons of an applicant for admission in which a Congressional bill has been introduced. Judge Clancy follows from the singularity of the *Knauff* case that there is no basis for holding it an abuse of discretion to effectuate this deportation while previous deportation cases may have been handled differently.

This reasoning of the learned judge is erroneous. It is pointed out to this Court that the question whether the peculiar nature of this case makes the *Knauff* situation different from all others has been extensively discussed and argued before the Court of Appeals for the Second Circuit, when the first appeal on March 6, 1950 was submitted to the decision of said court. This becomes quite apparent from Judge Frank's decision, which at the end of the passage quoted above (p. 7), stated:

> "Meanwhile, she will be detained in custody at Ellis Island, as closely guarded as the Attorney General deems to be reasonably necessary to safeguard the Country's interests; therefore, she cannot become a security risk."

This was the court's answer to the argument of the Government's attorney that Mrs. Knauff's case, being a security case, is of a singular nature. This question having been decided in favor of Mrs. Knauff on the first appeal, it was not open for a new decision in the District Court when this matter came up before Judge Clancy. The decision of the Court of Appeals of March 28, 1950 was an adjudication of this question. It became "the law of the case". Judge Clancy had no power to reopen this question.

Judge Clancy's opinion further is based on the finding that the alien enemy cases set forth in the Government return, paragraph 9 (15), are examples of deportations having taken place in the past while private bills for the relief of a deportable alien were pending.

In opposition to this conclusion, the petitioner had made extensive allegations in paragraphs 7 and 8 of the traverse (20-25). These allegations give expression to two separate trends of thought. In paragraph 7 of the traverse it was attempted to impress upon the court the difference between the removal of an alien enemy as exemplified in the decision of this Court, *United States ex rel. Luedecke* v. *Watkins*,

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1948, 335 U. S. 160, 68 S. Ct. 1429, and between an ordinary deportation case under the immigration laws. It has been said in said traverse that the present case is a deportation case under the immigration laws while the cases cited by the Government in par. 9 of the return, concern "removals" of alien enemies under the Act of 1798. It has been stated to the courts below that deportation is subject to court review under Sec. 10 of the Administrative Procedure Act, while the removal of alien enemies is not subject to court review with regard to the exercise of administrative discretion. It has been followed from the different nature of removals and deportations that the exceptions quoted in the Government's return are of a different nature so that they do not constitute a precedent for the handling of deportation cases in which a private bill has been introduced. Judge Clancy does not accept these differentiations. His opinion says "the difference is not disputed but we are unable to discern its importance." We respectfully disagree with the learned Justice and think that for the reasons stated, removal and deportation cases have to be differentiated.

But even if Judge Clancy's opinion that removal and deportation cases are of a similar nature has to be accepted, Judge Clancy has entirely disregarded the factual allegations in paragraph 8 of the traverse (24) where it was expressly alleged and fully substantiated that in fact the private bills in behalf of the alien enemies had been disposed of by Congress in a negative way and that therefore the deportations of July 8, 1948 were in full harmony with the rule that deportation should not take place while Congressional action is pending. Judge Clancy, in conformity with the direction of Judge Frank's decision of March 28, 1950, therefore, should have held a plenary hearing for the taking of evidence whether or not Congressional action had taken place and disposed of said private bills as alleged in para-

graph 8 of the traverse. His omission to do so was contrary to the direction in the Court of Appeals' decision of March 28, 1950 and, even without that direction, improper because issues of fact in a habeas corpus proceeding must be determined upon the taking of evidence in a plenary hearing (trial).

Questions Presented

The following legal questions are presented in this case:

1. Is it an abuse of discretion on the part of the Attorney General to attempt petitioner's deportation while private bills in her behalf have been introduced in both Houses of Congress; and furthermore, these bills are actively processed and considered; and furthermore one of these private bills has been passed unanimously in the House of Representatives and is being actively considered in the Senate?

2. May the Attorney General justify his unusual handling of the Knauff case and his defiance of Congress because of the "security" character of this case, although this issue had already been determined in petitioner's favor in the decision of the Court of Appeals of March 28, 1950?

3. Does the agreement between the Congress of the United States and the Department of Justice, entered into in 1948, as set forth on p. 608 of Senate Document No. 1515, 81st Congress (*supra*, p. 10), in itself make the present attempt at petitioner's deportation illegal?

The courts below have answered the first and third questions with "No", and the second question, with "Yes". Petitioner suggests that the answers to said questions should be opposite.

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The Reasons Why Certiorari Should Be Granted

Pursuant to Rule 38 of the General Rules of the United States Supreme Court (sub. Sec. 5 (b)), certiorari will, in the sound judicial discretion of the learned Justices of this Court, be granted: Where there is an important question of federal law, which has not been, but should be, settled by this Court; or where a decision of a lower court has so far departed from the accepted and usual course of traditional proceedings, as to call upon the exercise of this Court's power of supervision. It is suggested that certiorari should be granted under said provisions.

It is respectfully suggested that the present case should find particular consideration in this high court of justice, because of the great public interest which it has aroused among the People of the United States from coast to coast. This is one of those fundamental cases in which, as in those of Sacco and Vanzetti and Thomas Mooney, the People of the United States rally to the succor of a person that has become the victim of an apparent miscarriage of justice. But while Sacco, Vanzetti and Mooney had full and public trials and while, upon the evidence, the public opinion was violently divided in those cases, we find the People of the United States unanimous in the resentment of the Star Chamber proceedings accorded this war bride by the Department of Justice. Everybody is particularly grieved that such high handed injustice is done in this case to persons who have a special claim for consideration. A woman who in her own right, is an honorably discharged war veteran and who has served with distinction during the last war, and afterwards, the governments of Great Britain and the United States for seven years, is sought to be excluded from this country without a hearing or confrontation with charges. This woman is the wife of an honorably discharged veteran of our war against Germany, to whom the American public feels indebted.

It is respectfully submitted that the personalities of these two people, the petitioner Mrs. Knauff and of her husband, ought to be considered by this Court when the question is weighed whether this Court should review this case.

A further reason why this case should find scrutiny and review by the greatest judicial minds of this country is that, whatever accusations have been proffered by indirection against this petitioner, they are so inconsistent in themselves, that they carry on their face the evidence of error and official bungling. We want to refer just incidentally to the "Dear Joe letters" of the former Attorney General, set forth in the record of the previous case (fols. 70 to 75), in which the Attorney General states as a reason for the exclusion of the petitioner, that she informed the Czech government on American military personnel connected with the Civil Censorship Division in Frankfurt am Main. Said Civil Censorship Division was dissolved in August, 1947, more than half a year before the Communists came to power in Czechoslovakia and at a time when Mr. Benes, the internationally renowned and revered statesman, a great friend of the United States, was President of Czechoslovakia.

At the hearings before the Sub-Committee on Immigration, copies of which are deposited with the Clerk of this Court, the members of said Committee were so little impressed by the flimsy accusations made by Mr. Peyton Ford,[1] the Assistant to the Attorney General, in his report to Congress, that the Honorable Francis E. Walter, Representative from Pennsylvania, characterized the Government objections as "over-the-back-fence gossip, which is the lowest form in the United States."[2]

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[1] Mr. Ford's objections are contained verbatim in Congressman Gossett's Report 1940 on pp. 3-5.

[2] See "Hearings before Subcommittee No. 1, etc." p. 11.

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It is respectfully submitted that the opinion of this Honorable legislator, who has served this country in Congress with distinction for over eighteen years and to this day commanded the respect of the citizens of the United States at large, is entitled to at least the same consideration as that of Mr. Ford, the Assistant to the Attorney General.

This court, to do justice, may also consider the motives behind the zeal with which the Department of Justice has been trying to remove Ellen Knauff from the United States. The inconsistency of the charges against Ellen Knauff, the devious ways by which the Department of Justice so far has proceeded against her, the contemptuous attitude taken by the Department against the Congress of the United States, all tend to indicate that the motives behind the exclusion of Ellen Knauff are of a questionable nature.

It is respectfully submitted that to do justice under such circumstances might be an impressive reason for the Honorable Justices of this Court to grant certiorari.

There is also an unsolved and very important question of law involved in this case. Since the Immigration Laws of this country have assumed their present stringency, there are cases every year which cannot find an equitable solution under the abrupt mandates of the Immigration Laws. Wherever a set of facts occurs, that makes the exclusion or deportation of an alien mandatory under our Immigration Laws, while at the same time strong equities in favor of such alien prevail, it has been the time honored rule of Congress to exercise and apply the conscience of the United States by making private bills for relief in meritorious individual cases. The present case poses the question whether the Attorney General has the right where he sees fit, to frustrate Congressional action in an individual case, despite the fact that during the last fifty years it has been the invariable practice of the Department of Justice to stay deportation while private relief bills for the respective aliens were pend-

ing and despite the further fact that the Department of Justice has entered into solemn commitments with the Congress of the United States not to deport aliens during the pendency of a private bill for their relief.

WHEREFORE, it is respectfully prayed that a writ of certiorari to the United States Court of Appeals for the Second Circuit should issue.

Dated: New York, New York,
May 24, 1959.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1949

No.

UNITED STATES OF AMERICA, *ex rel.* ELLEN KNAUFF,

Petitioner,

against

J. HOWARD MCGRATH, Attorney General and EDWARD J. SHAUGHNESSY, as District Director of the Immigration and Naturalization Service for New York District, and whosoever may have custody of the body of ELLEN KNAUFF,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner has submitted a petition for a writ of certiorari and the record containing the transcribed papers of the proceedings below.

This brief sets forth the legal argument, point by point, quoting and citing authority where necessary, and mentioning additional facts appearing on the record where advantageous for continuous reasoning.

A previous decision of the Court of Appeals for the Second Circuit of March 28, 1950, is annexed to this brief as Appendix.

POINT I

The decision of the Court of Appeals of March 28, 1950 is the law of the case and it was error on the part of the District Judge to deviate from said decision.

The phrase "law of the case" is sometimes applied to an order of the court which decides a question of law or fact and which thereafter is deemed decided for further proceedings in the same court. It also may mean that a higher court has decided a question of fact or law which the lower court is bound to follow in all subsequent proceedings. We apply the phrase "law of the case" in the latter sense. On the previous appeal herein, certain propositions of law and fact were before the United States Court of Appeals for the Second Circuit. The majority of said court, by the opinion of Jerome Frank, J., among other things, held that there was nothing in the present record to justify the singling out of Mrs. Knauff for individual and unusual treatment, and it came to the clear conclusion

> "We do not hold that she is not to be excluded, i.e., we do not hold that she is to be admitted. We merely hold that as long as Senator Langer's bill is pending during the present session of Congress, the exclusion order may not be executed. Meanwhile, she will be detained in custody at Ellis Island, as closely guarded as the Attorney General deems reasonably necessary to safeguard the country's interests; therefore, she cannot become a security risk."

Here, the Court, with language whose lucidity could not be improved upon, has decided that the fact that this is a security case and that Ellen Knauff has been dubbed a security risk by the Attorney General, was no ground

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why her deportation should not be delayed while she was being held under such custody at Ellis Island as would safeguard the country's interests.

This question whether the security angle makes the *Knauff* case a peculiar one, has, therefore, been decided by the Court of Appeals during the previous appeal herein. Nevertheless, the decision appealed from herein of Judge Clancy dated May 3, 1950 states:

> "The return of the Government officials calls to our attention that this case is *sui generis*, that it is the first case involving the exclusion for security reasons of an application for admission wherein during the pendency of a bill in Congress application for an administrative stay of deportation has been made and that this is the first time that the Attorney General and Commissioner of Immigration and Naturalization have considered the wisdom and advisability of granting such a stay in a security exclusion case though a bill was pending in Congress. Petitioner has not disputed these allegations and her distinction of the precedents as involving deportations emphasizes the poverty of her case. Any comparison of a security exclusion case and a removal security case would certainly add strength to the Government's position."

We limit ourselves to quoting as authority that Judge Clancy was prevented from setting up his own rule in this case where the rule was bindingly announced by the Superior Court, the decision of *Higgins* v. *White*, 1940, 31 F. Supp. 796-798, where it was held by McLellan, D. J., as follows:

> "Clearly, I must set the decision of the Circuit Court of Appeals as binding upon me, though without such a guide I might have reached a different result."

The proposition emphasized here concerning the law of the case is of such elementary nature that we confine ourselves to referring to the following decisions:

> *Thornton* v. *Carter*, 1940, 109 F. 2d. 316, C. A. 8;
> *Toucey* v. *New York Life Insurance Company*, C. A. 8, 1940, 112 F. 2d, 927, Certiorari granted 61 S. Ct. 440, 311 U. S. 643, Aff'd 61 S. Ct. 833, 313 U. S. 538, Vacated 61 S. Ct. 938, 313 U. S. 596, Reversed 62 S. Ct. 139, 314 U. S. 118.

We conclude from the foregoing that it was error when Judge Clancy gave the security aspect of this case significance in distinguishing it from other deportation cases after this question had been decided by the Superior Court. We also claim that it was an error on the part of Judge Clancy not to follow the determination contained in Judge Frank's decision that the issues or fact resulting from a denial on the part of the Government of petitioner's allegations as to the administrative practice should be tried in the court below. ("Of course there will be a trial of the resulting issues of fact.")

POINT II

Issues of fact in habeas corpus proceedings should be determined in a plenary hearing in which evidence is received by the Court. It was error on the part of the Courts below to deny petitioner a trial of the issues of fact raised in the pleadings and affidavits submitted to the District Court.

The foregoing proposition of law has been established by the decision of this Court in *Walker* v. *Johnston*, 1941, 312 U. S. 275, 61 S. Ct. 574, where Mr. Justice Roberts, delivering the opinion of the Court held (284):

"The District Court proceeded to adjudicate the petitioner's right to the writ upon the allegations of his petition and traverse and those of the return and accompanying affidavits. Thus the case was disposed of on *ex parte* affidavits and without the taking of testimony. The practice thus to dispose of applications for habeas corpus on matters of fact as well as of law has been followed in the Ninth and Tenth Circuits.

"In other circuits, if an issue of fact is presented, the practice appears to have been to issue the writ, have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments'."

In the present case issues of fact were raised as set forth in the petition herein by the allegation of the traverse that the alien enemy cases referred to in paragraph 9 of the Government return (15 to 16) had been disposed of in the Senate of the United States so that the cases enumerated by the Government were no exception to the rule that deportations should not take place while private bills are pending. The courts below also disregarded the new allegation that an agreement had been made between the Department of Justice and the Houses of Congress concerning the stay of deportations while private bills are pending. The courts below should either have taken judicial notice of Senate Document No. 1515, page 608, quoted above at page 10, or taken evidence to the truthfulness of this allegation.

POINT III

The Courts have the power to intervene where administrative officers abuse their discretion.

The question to which extent the administrative authorities are subject to the Administrative Procedure Act of 1946 has been argued and discussed ever since the Administrative Procedure Act was passed and became the law of the land. A clarifying decision of the Supreme Court of the United States was rendered on the 20th of February, 1950 in the case of *Wong Yang Sung, Petitioner v. McGrath*, 339 U. S. 33. The court held that the Administrative Procedure Act was fully applicable to deportation proceedings and that qualified examiners under the Administrative Procedure Act have to hold deportation hearings. Said the court by Jackson, J.:

> "We find no basis in the purposes, history or text of this Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies. We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity."

The import of this case, it is respectfully submitted, goes far beyond the issues of a deportation proceeding. The decision of the Supreme Court shows that the Administrative Procedure Act has to be interpreted not as codifying existing procedure but as an act *de novo* regulating administrative procedure, including procedure in the Immigration Service.

It is therefore apparent that Section 10 of the Administrative Procedure Act, which is Section 1009, Title 5, United States Code, has to be read in the light of the said decision of the Supreme Court as granting the courts supervisory powers over immigration procedure beyond those established by ancient precedent. Reference is particularly made to the language contained in Section 1009 under subdivisions (d) and (e) reading:

> (d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.
>
> (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity;"

In the present case a writ of habeas corpus has been applied for to prevent irreparable injury to the petitioner which would be caused by her deportation while Congres-

sional consideration is going on and while her testimony may be of great importance for the final decision of the Senate Committee on the Judiciary on the private bill for her relief. It is contended that Mrs. Knauff's deportation at this time when Congressional action is pending would be contrary to the invariable practice of the Department of Justice to honor solemn commitments undertaken by the Department of Justice on agreements it made with the Congress of the United States. To treat this woman differently from all other people and in breach of solemn agreements would be an abuse of discretion and to such an extent subject to court review. Reference is respectfully made to the case of *U. S. ex rel. Pirinsky* v. *Shaughnessy*, 1950, 177 F. 2d 708, 709, where it is held:

> "It was brought out at the argument before us that the bail ultimately set was uniquely high in this type of proceeding * * * Unless, therefore, the Immigration Service intends to confine all alien Communists indefinitely during lengthy deportation proceedings, there is nothing in the record to justify the singling out of this individual for unusual treatment."

This case establishes the rule that to single an alien out for unusual treatment is an abuse of discretion. In the present case we have a situation in which a private bill and a public bill for the relief of this alien are pending, such bills invariably being honored by the Department of Justice. Whenever a private bill is introduced in Congress, the Department of Justice stays deportation in exclusion and other proceedings until congressional action has been taken. The remedial and equitable effect of private bills would otherwise be nullified.

In the instant case the Immigration Service has singled out Ellen Knauff for unusual individual action, for action deviating from such as is ordinarily taken. The Commissioner of Immigration is acting capriciously and whimsically against this young woman. Such action is, as 5 U. S. C. 1009 (e) shows, arbitrary, capricious, and an abuse of discretion, calling for court review.

It is further pointed out that under authority of the *Pirinsky* case the Court of Appeals herein, as the decision of March 28, 1950 shows, affirmed its power to intervene in the present case which now should be exercised so that the deportation of petitioner be stayed until the Senate of the United States makes a final determination of the pending private bills for the relief of Mrs. Knauff.

CONCLUSION

A writ of certiorari to the United States Court of Appeals for the Second Circuit should issue.

May 24, 1950.

Respectfully submitted,

GUNTHER JACOBSON,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 192—October Term, 1949

(Argued March 6, 1950 Decided March 28, 1950)

Docket No. 21616

UNITED STATES OF AMERICA, *ex rel.* ELLEN KNAUFF,
Relator-Appellant,

against

J. HOWARD MCGRATH, Attorney General, and EDWARD J. SHAUGHNESSY, as District Director of the Immigration and Naturalization Service of the New York District and to whomsoever may have the custody of the body of ELLEN KNAUFF,

Respondent-Appellee.

Before:

L. HAND, SWAN and FRANK,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York. REVERSED AND REMANDED.

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GUNTHER JACOBSON *for relator-appellant;*

IRVING H. SAYPOL (David McKibbin and William J. Sexton, of counsel; Louis Steinberg and Lester Friedman, Immigration and Naturalization Service) *for respondents-appellees.*

The relator, Mrs. Knauff, born in Germany, arrived at the port of New York on August 14, 1948, seeking admission to this country under the War Brides Act, 8 U. S. C. A. Section 232. She was detained at Ellis Island. On recommendation of the Assistant Commissioner of Immigration and Naturalization, the Attorney General, on October 6, 1948, decided that she should be permanently excluded, without a hearing, on the ground that her admission would be prejudicial to the interests of the United States. Her counsel then filed, in the court below, a petition for a writ of habeas corpus; the district court dismissed the writ; on appeal, this court affirmed.[1] The Supreme Court, having granted certiorari affirmed[2] on the ground that the War Brides Act was subject to 22 U. S. C. A. Sec. 223, which, via a Presidential Proclamation and regulations, conferred upon the Attorney General the power, during war or "the existence of the national emergency proclaimed by the President on May 27, 1941," to exclude an alien if he found that the alien's entry would be prejudicial to the interests of the United States, and so to find without a hearing "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

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[1] U. S. ex rel. *Knauff* v. *Shaughnessy*, 173 F. (2d) 599 (C. A. 2).

[2] U. S. ex rel. *Knauff* v. *Shaughnessy*, —— U. S. —— (Jan. 16, 1950).

The mandate was filed in the district court on February 20, 1950. Subsequently, the Naturalization and Immigration Service was about to deport her, when, on February 27, her counsel filed in the district court another petition for habeas corpus stating, among other things, the following:

> "A private bill to relieve Mrs. Knauff from the exclusion order against her has been introduced by Hon. William C. Langer, Senator from North Dakota, who introduced S. 2979 which, on February 2, 1950, was read in the Senate and referred to the Committee on the Judiciary. Said bill proposes to authorize the Attorney General and to direct him to discontinue exclusion proceedings, and to cancel the outstanding order of exclusion issued against Ellen Knauff, and to permit her immediate entry into the United States for permanent residence. It also proposes that said Ellen Knauff shall not be subject to deportation by reason of the facts upon which exclusion proceedings were commenced or the exclusion order issued * * * It has been the invariable practice, in the past, to stop all deportation proceedings, as if and when congressional action has been taken and a private or remedial bill actually been introduced in either House of Congress, as has been done in the present case * * * I called upon Mr. Mackay, Deputy Commissioner of Immigration and Naturalization, on Monday, February 20, 1950, in his office at Washington, D. C. At that time I inquired whether the action taken by Congress would be honored by the government or whether it was contemplated to deport Mrs. Knauff before congressional action had been taken. Mr. Mackay at that time told me that it was the practice of the Immigration and Naturalization Service not to effectuate deportation while relief bills concerning an alien were pending in Congress, and that it was not contemplated in the present case, to bring about deportation before Congress had acted on the bill."

The respondent filed no return. No evidence was heard. The district court entered an order refusing to grant a writ. This appeal is from that order. This court granted a stay of deportation pending the decision of this appeal.

FRANK Circuit Judge:

Respondents in their brief concede that the applicable statutory provision in 8 U. S. C. A. Sec. 154 which provides: "All aliens brought to this country in violation of law shall be immediately sent back * * * to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper." That "deportation" in that context includes "exclusion" seems clear on the face of the statute.[3]

Respondents, also, on oral argument of this appeal, conceded that, on the pleadings as they now stand, we must take it as true that, as alleged in the petition, "it has been the invariable practice to stop *all* deportation proceedings" whenever a bill, such as Senator Langer's, has been introduced in either House of Congress. We underscore the word "all". It allows of no exceptions of cases, like this, in which an alien has been ordered to be excluded because the Attorney General, on confidential information, found that the alien's entry would be prejudicial to the interests of the United States.

This "invariable practice" may be regarded in one (or both) of the following two ways:

(1) The practice constitutes an administrative interpretation of the Act to the effect that it is never "proper" in "the opinion of the Attorney General" not to suspend execution of an exclusion order when a Senator or Con-

[3] See also 8 C. F. R. (1949 edition) Sec. 1452.

gressman introduces such a bill and that bill is still pending. Such a settled administrative interpretation, unless unreasonably or flatly contrary to the statute, has generally been given great weight,[4] especially when the statute, thus administratively interpreted, has been reenacted by Congress.[5] 8 U. S. C. A. Sec. 154 was reenacted, with changes of no significance here, in 1944. It is most unlikely that Congress was unaware of this administrative interpretation, inasmuch as it related to the introduction of bills by Senators and Congressmen.

(2) 8 U. S. C. A. Sec. 154 gives the Attorney General discretion to determine when "immediate deportation is not * * * proper." By the adoption of an "invariable practice", he has established a class of situations with respect to which he has always exercised that discretion to suspend deportation. That classification is entirely reasonable. To depart from it in a single instance is to act arbitrarily or capriciously, to abuse the administrative discretion.

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[4] See, e.g., *U. S.* v. *Moore*, 5 Otto (95 U. S.) 760, 763; *U. S.* v. *Macdaniel*, 7 Pet. 1, 14-15; *U. S.* v. *Finnell*, 185 U. S. 236, 243-244; *U. S.* v. *Sweet*, 189 U. S. 471, 475; *U. S.* v. *Johnston*, 124 U. S. 237, 253; *Hahn* v. *U. S.* 107 U. S. 402, 405-406; *U. S.* v. *Philbrick*, 120 U. S. 52, 59; *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *Logan* v. *Davis*, 233 U. S. 613, 627; cf. U. S. ex rel. *Hirschberg* v. *Cooke*, 336 U. S. 210, 216; *Hiatt* v. *Brown*, —— U. S. —— (March 13, 1950); *U. S.* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Gray* v. *Powell*, 314 U. S. 402; *Billings* v. *Truesdell*, 321 U. S. 542, 552-553; *U. S.* v. *Minnesota*, 270 U. S. 181, 205; *Sivendig* v. *Washington Co.*, 265 U. S. 322, 331; *Kern River Co.* v. *U. S.*, 257 U. S. 147, 154; *U. S.* v. *Shreveport Grain & El. Co.*, 287 U. S. 77, 84; *Wisconsin* v. *Illinois*, 278 U. S. 367, 413.

[5] See, e.g., *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479; *U. S.* v. *G. Falk & Brother*, 204 U. S. 143, 152; *U. S.* v. *Cerecedo Hermanos Y Compania*, 209 U. S. 337, 339; *National Lead Co.* v. *U. S.*, 252 U. S. 140, 146; *U. S.* v. *Bailey*, 9 Pet. 238, 255.

Whichever of the two foregoing views we accept, the refusal to suspend action here, on the record facts, was improper. In *U. S. ex rel. Piriusky* v. *Shaughnessy*, 177 F. (2d) 709 (C. A. 2), an alien, a resident of this country, was arrested and taken in custody in deportation proceedings. On his application for release on bail, pending decision, the Attorney General, purporting to exercise the discretion granted him by 8 U. S. C. A. Sec. 156, fixed bail at $25,000. The alien sought habeas corpus. We held that bail in excess of $5,000 was unreasonable, saying: "It was brought out at the argument before us that the bail ultimately set was uniquely high in this type of proceeding", adding that "there is nothing in the record to justify the singling out of the individual for unusual treatment."

That ruling is applicable here. It accords with many cases deciding that arbitrary use of administrative authority is invalid.[6] It is worth recalling that that doctrine, now a vital part of American liberties, received its clearest enunciation in the famous case of the Chinese laundryman.[7] To be sure, he was a resident alien;[8] and it may be—although we need not and do not here so decide—that Congress could constitutionally empower an official to use

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[6] See, e.g., *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Conally* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 560; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 240; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Green* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 515-518; *Bohler* v. *Callaway*, 267 U. S. 479, 489; *Whitfield* v. *Hanges*, 222 F. 745, 748 (C. A. 8); cf. U. S. ex rel. *Mastrapasqua* v. *Shaughnessy*, —— F. (2d) —— (March 2, 1950, C. A. 2).

[7] *Yick Wo*, v. *Hopkins*, 118 U. S. 356.

[8] Moreover, the "equal protection" clause of the Fourteenth Amendment was there invoked, while here we have action by a federal official. We need not decide whether the "due process" clause of the Fifth Amendment includes "equal protection" in these circumstances — cf. *Whitfield* v. *Hanges*, 222 F. 745, 748 (C. A. 8)— for we do not rest our decision on constitutional grounds.

his sheer personal whim or caprice in dealing with aliens (like relator) stopped at the border. But, absent an explicit congressional grant of such arbitrary power, we think it cannot be implied.[9]

In such circumstances as this, habeas corpus may be employed not to procure relator's release but to prevent the improper course respondents intended to pursue.[10] For the habeas corpus statute[11] provides that the court shall "hear and determine the facts, and dispose of the matter as law and justice may require."[12] See *United States ex rel. Zaffarano* v. *Corsi*, 63 F. (2d) 757, 758 (C. A. 2).

It is true that the Attorney General has already exercised his discretion (without a hearing) to exclude relator; that, in doing so, he decided that her admission would be prejudicial to the interests of the United States; and that this court and the Supreme Court sustained his decision. But his decision dealt with the issue of her exclusion. We do not hold that she is not to be excluded, *i.e.*, we do not

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[9] As an indication of a congressional policy against such arbitrary conduct, compare the Administration Procedure Act, 5 U. S. C. A. Sec. 1009 (e), as to the duty of a court reviewing administrative conduct; "It shall * * * set aside * * * action * * * found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Cf. *Wong Yang Sung* v. *McGrath*, —— U. S. —— (February 20, 1950).

[10] *Tod* v. *Waldman*, 266 U. S. 113, 118; *Mahler* v. *Eby*, 264 U. S. 32, 46; U. S. ex rel. *Mazur* v. *Commissioner*, 101 F. (2d) 707, 709 (C. A. 2); U. S. ex rel. *Di Paola* v. *Reimer*, 102 F. (2d) 40, 42 (C. A. 2); U. S. ex rel. *Zaffarano* v. *Corsi*, 63 F. (2d) 757, 758 (C. A. 2).

[11] 28 U. S. C. A. Sec. 2243 (formerly 28 U. S. C. A. Sec. 461).

[12] Referring to this language, the Court said in *Storti* v. *Massachusetts*, 183 U. S. 138, 143: "All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in habeas corpus."

hold that she is to be admitted. We merely hold that, so long as Senator Langer's bill is pending during the present session of Congress, the exclusion order may not be executed. Meanwhile she will be detained in custody at Ellis Island, as closely guarded as the Attorney General deems reasonably necessary to safeguard the country's interests; therefore she cannot become a security risk.[13]

Our decision, however, rests on the present state of the record. On the remand of this case, respondents should be permitted, if they so desire, to file a return denying the relator's allegations as to the administrative practice. If they do so, of course there will be a trial of the resulting issue of fact.[14]

Reversed and Remanded.

L. Hand, Circuit Judge (concurring):

I wish to base my concurrence on what is a somewhat narrower ground than my brother Frank, as I understand him. The case comes to us on a record which, as he says, compels us to assume that the Attorney General has hitherto in all cases postponed deportation while a bill to admit the alien has been pending in Congress. This practice may never in fact have covered the case of an alien whose presence the Attorney General has found to be prejudicial to the interests of the United States; and it can be argued that we should not assume that it has gone so far. However, since it is alleged to have been a general practice, we should ac-

[13] Of course, if Congress should enact the bill, she will be released.

[14] Judge Hand and I disagree to this extent: He would require no proof if the return states that the Attorney General has found that relator's presence, even at Ellis Island, would be prejudicial to the interests of the United States.

cept the allegation as it reads, unless the return denies that it has ever covered cases like the realtor's. The absence of any such denial and of any excuse seems to me to present an unrelieved instance of administrative caprice, which we may not ignore.

The absence of any denial would not in my judgment lead to a grant of the writ, if it were supplied by the excuse which I shall mention; and it is in this that I may not be in accord with Judge Frank. To continue the analogy of the old course of pleadings, the return, instead of denying the applicability of the practice to the relator might have pleaded in confession and avoidance, that the Attorney General has found that the alien's continued presence in the United States would be prejudicial to its interests, even though she were detained at Ellis Island. I should accept that plea as a defense, because I think that no court has power to inquire whether it is supported by the facts; it is enough that on its face it is not beyond the possible reach of the discretion conferred. Such a finding would be altogether different from the finding already made that the alien's admission as a resident would be prejudicial to the interests of the United States. It may be argued that it ought to be implied from the order of deportation itself; but I think that that is not true. The order may have been made because the practice never covered such a case; and, that aside, it appears to me that the exercise of so drastic and absolute a power should not be left to implication, but should be expressly avowed. There is some genuine protection in insisting upon bringing into the clear the basis of such official action, even though a court may inquire no further. Hence, in spite of the absence of any denial of the applicability of the practice, I should have voted to affirm the order, if it had contained an allegation that the Attorney General had found that the detention of the alien, even though in custody, was prejudicial to the interests of

the United States. Since, however, it contained neither a denial, nor such an excuse, I agree that the order must be reversed, and the cause remanded with leave to the respondent to replead.

SWAN, Circuit Judge, dissenting:

The appellant was excluded from admission to this country and the order of exclusion was affirmed by the Supreme Court. Pursuant to §154 of Title 8, the immigration officials made arrangements to send her back to the country whence she came. On the day preceding the date fixed for her departure, a petition for habeas corpus was filed on her behalf in the district court to stay her deportation. The district judge forthwith denied the petition. He stated that he refused to grant the writ because he knew of no law giving him authority to issue it.

. . . My brothers are agreed that the order must be reversed, a writ must issue, and the respondents must be given an opportunity to file a return thereto. If no return is filed, I take it that the respondents will be ordered to defer deportation of the appellant so long as a remedial bill to admit her remains pending in Congress. If a return is filed, my brothers appear to be not in complete agreement as to what course the subsequent proceedings will take.

Judge Hand believes that if the return states that "the Attorney General has found that the alien's continued presence in the United States would be prejudicial to its interests, even though she were detained at Ellis Island, "the writ will be discharged without any hearing because no court has power to determine whether the excuse stated is supported by facts. As a technical objection to this view it may be noted that to speak of this alien's "continued presence in the United States" runs counter to the legal theory that an alien stopped at the border is still in theory of law outside the country, even though physically allowed

to enter, as this court has recently held with respect to this very alien. *Knauff* v. *Shaughnessy*, 179 F. (2d) 628. A substantial objection is the futility of the proposed procedure. To issue the writ, merely to permit the Attorney General to say that he exercised his discretion in the public interest seems to be a barren formality. Concededly the alien is excludable and must be sent back to the country whence she came. The discretion which §154 confers upon the Attorney General is to send her back "immediately", or to defer her departure, if in his opinion "immediate deportation is not practicable or proper." The Attorney General must be presumed to perform his duty and to exercise in the public interest the discretion conferred upon him. If the court cannot consider whether the facts upon which the Attorney General acts justify his action, I can see no useful purpose in requiring him to plead. The ordinary plea in confession and avoidance raises issues of fact which, if denied, must be tried out, but in the case at bar, if I correctly understand Judge Hand's view, a plea such as he suggests will end the case and the writ will be discharged.

Judge Frank suggests that upon remand the respondents may "file a return denying the relator's allegations as to the administrative practice" and, if they do, "there will be a trial of the resulting issue of fact." This I take to mean that the only ground on which the writ may be discharged will be the relator's failure to prove the existence of an "invariable practice" to suspend deportation proceedings when a private bill for the deportee's relief has been introduced in Congress. This court's decision in *United States ex rel. Pirinsky* is relied upon. I do not think it supports my brother's decision in the case at bar. In the first place, that case dealt with the provision in §156 that pending the final disposition of his case, an alien may be released under bond. That provision was plainly intended for the benefit of the alien. The discretion con-

ferred by §154, with which we are now dealing, is to be exercised not for the benefit of the alien but with a view to what is "practicable or proper" in the public interest of efficient administration of the provisions relating to sending back excluded aliens. Secondly, and more important, although we held in the *Pirinsky* case that it was an abuse of discretion to set bail at a "uniquely high" sum when the particular circumstances of the relator's case did not justify singling him out for such treatment, we did not hold that a deviation from invariable administrative practice was itself an abuse of discretion regardless of circumstances. Yet that is the doctrine which my brothers have here adopted. They do not contemplate, if I understand them, an inquiry into the particular circumstances of the appellant's case, which might differentiate it from other prior cases and justify a departure from the alleged invariable administrative practice. I do not understand how it can be within the competence of a court to declare the exercise of administrative discretion unreasonable if the court may not inquire into the reasons upon which the administrative official acted.

I think the order should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 842

UNITED STATES OF AMERICA EX REL. ELLEN KNAUFF, PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AND EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE NEW YORK DISTRICT, AND WHOSOEVER MAY HAVE CUSTODY OF THE BODY OF ELLEN KNAUFF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On January 16, 1950, this Court sustained the validity of an order of the Attorney General permanently excluding petitioner from the country as an alien whose entry would be prejudicial to the interests of the United States. *Knauff* v. *Shaughnessy*, 338 U. S. 537. Thereafter, on or about February 27, 1950 (see R. 10), petitioner

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